

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BEVERLY L. BOVE,

Plaintiff,

v.

C.A. No. 05C-10-134 (CHT)

LESLIE GOLDENBERG, CHRISTY
HENNESSEY, COMMUNITY LEGAL AID
SOCIETY, DANIEL ATKINS, AND
MARYBETH MUSUMECI,

Defendants.

OPINION AND ORDER

On Defendants' Motions to Dismiss

Submitted: **August 21, 2006**

Decided: **February 7, 2007**

Vincent J. X. Hedrick, II, Esquire and Beverly L. Bove,
Esquire; Wilmington, DE 19899, Attorneys for Plaintiff
Beverly Bove

Daniel P. Bennet, Esquire and Miranda D. Clifton, Esquire,
HECKER & FRABIZZIO, Wilmington, DE; Attorneys for Defendant
Leslie Goldenberg

Robert K. Pearce, Esquire, FERRY JOSEPH & PEARCE, P.A.,
Wilmington, DE; Attorney for Defendant Christy Hennessey

John A. Parkins, Jr., Esquire, and K. Tyler O'Connell,
Esquire, RICHARDS LAYTON & FINGER, P.A., Wilmington, DE;
Attorneys for Defendants Community Legal Aid Society, Daniel
Atkins and MaryBeth Musumeci

TOLIVER, JUDGE

Before the Court are motions filed by defendants Atkins, Musumeci, and Community Legal Aid Society ("CLASI") to dismiss the complaint filed against them by the plaintiff. Defendants Goldenberg and Hennessey have joined in those motions. In addition to denying any wrongdoing, the defendants have raised certain affirmative defenses which they contend bar the relief sought by the plaintiff. The matter having been briefed and argued, that which follows is the Court's resolution of the issues so presented.

STATEMENT OF FACTS AND NATURE OF THE PROCEEDINGS

The Parties

The plaintiff is a member of the bar of the Supreme Court of Delaware. During all time relevant to this matter, the plaintiff practiced law in New Castle County, Delaware. Defendant Goldenberg is the owner of an interpreter service for the hearing impaired while defendant Hennessey acted as program coordinator for Independent Resources, Inc., an advocacy group for the hearing impaired. Both are residents of and/or operate

professionally in the State of Delaware. Finally, at all times relevant to this action, defendant CLASI employed Mr. Atkins and Ms. Musumeci, both members of the Delaware Bar, as attorneys representing indigent members of the public.

The Dispute

The instant saga began when an attorney from New York contacted the plaintiff in January 2005 seeking Delaware counsel to represent a hearing impaired couple from New York. That couple, Larry and Patty Hampel, apparently had been injured in an auto accident in this state. They are not parties to the instant litigation. An appointment with the plaintiff was scheduled. Shortly thereafter, a relative of the Hempels called to inform the plaintiff that he would translate what transpired into sign language during the consultation. It appears that this sequence of events took place at some point in time during the first two weeks of January 2005.

On or about January 17, 2005, defendant Goldenberg

called the plaintiff's office indicating that she would interpret for the Hampels during their meeting with the plaintiff and that the plaintiff would be responsible for paying the cost of the services that she rendered in that regard. The plaintiff advised Ms. Goldenberg that her services were not needed because a relative of the Hampels would be interpreting for the couple. On January 18, 2005, the Hampels cancelled their appointment with the plaintiff.

Two days later, on January 20, Mr. Atkins and Ms. Musumeci filed a complaint on behalf of the Hampels alleging that the plaintiff refused to hire an interpreter for the Hampels in violation of the Delaware Equal Accommodations Law.¹ The complaint was refiled on February 10, 2005. The plaintiff denied the charge and retained counsel to represent her before the HRC.

The Human Relations Commission heard the matter on July 20, 2005. Ms. Goldenberg testified before the HRC

¹ 6 Del. C. §4500

panel regarding the facts surrounding the plaintiff's refusal to pay for an interpreter. In its decision dated August 25, 2005, the HRC panel found Ms. Goldenberg's testimony "inconsistent and less than credible." The HRC panel further concluded:

Ms. Goldenberg did the Hampels a disservice by her own failure to effectively facilitate communications between the Hampels and the attorney's office and by jumping to a conclusion (that Ms. Bove was 'refusing to pay' for an interpreter) that was not reasonable under any version of the testimony presented, even her own. The result was that the Respondent (Ms. Bove) never had the opportunity to evaluate and respond to the Hampels' need for accommodations and the Hampels understandably thought that their need for accommodations had been properly conveyed and refused when this was not the case.²

The Parties' Contentions

On December 5, 2005, the plaintiff filed an amended complaint forming the basis of the instant action in this Court setting forth three counts against each

² Pl. Compl., D.I. 1, Exh. A at 15.

defendant.³ The first two causes of action alleged defamation of character and tortious interference with business relationships. The third charged each defendant with having engaged in a civil conspiracy which inured to the detriment of the plaintiff. As a result of the defendants' conduct, the plaintiff claims to have lost at least two, potential clients. In addition, she maintains that the defendants maligned her in the community at large and in the hearing impaired community in particular which in turn negatively impacts the referrals upon which her practice depends.

More specifically, in Count I, the plaintiff maintains that the defendants defamed her by publishing accusations of her alleged refusal to hire an interpreter to facilitate the scheduled consultation with the Hampels. In Count II, she charges that the defendants tortiously interfered with business relationships or expectancies when they intentionally spread misinformation which affected the viability and

³ The complaint was initially filed on October 14, 2005.

success of her legal practice. Finally, in Count III, the plaintiff claims that the defendants' conduct amounted to a civil conspiracy to fraudulently conceal from the Hampels and the HRC, information which would have obviated the need for a hearing before the HRC and prevented the injury to the plaintiff's reputation and practice.

The amended complaint is silent as to the exact role played by defendants Atkins and Musumeci. The only note taken of the other two individual defendants was that defendant Goldenberg informed defendant Hennessey that the plaintiff would not pay for an interpreter.⁴ The conduct about which the plaintiff complained was otherwise without specific definition in the complaint as originally filed or subsequently amended.⁵

The defendants deny that they are in any way

⁴ See Am. Compl. at ¶ 20.

⁵ Attached to the plaintiff's complaint as an exhibit are certain documents in the form of written confirmation of electronic mail ("email") or telephone messages. Those documents purportedly describe exchanges between the defendant Goldenberg, defendant Hennessey and Ms. Hemple between January 17 and March 2, 2005.

legally responsible for any of the losses the plaintiff claims to have suffered. First, they argue that any statements allegedly made by counsel were offered in connection with litigation, which would include HRC hearings. As a result, they are protected by an absolute litigation privilege and there was no defamation. Second, since the tortious interference claim is predicated on the same allegations that form the basis of the alleged defamation and is simply a recasting thereof, the defendants argue that the tortious interference claim is also barred by the same privilege. Lastly, the defendants contend that fraud which was the subject of the alleged conspiracy must be pled with particularity, and since the plaintiff's complaint contains nothing more than conclusory allegations, it fails to state a claim upon which relief can be granted and should be dismissed.

DISCUSSION

In considering a motion to dismiss for failure to

state a claim under Delaware Superior Court Civil Rule 12(b)(6), this Court "must assume all well-pleaded facts in the complaint to be true."⁶ A complaint will not be dismissed for failure to state a claim "unless it is clearly without merit, which may be a matter of law or fact."⁷ As such, the motion will be denied "if the plaintiff may recover under any conceivable set of circumstances susceptible to proof under the complaint."⁸ In viewing the facts, the Court must draw "all reasonable inferences in favor of the non-movant."⁹ The facts that may be considered by the Court in deciding a motion to dismiss include documents that are "integral to the plaintiff's claim and incorporated in the complaint."¹⁰

⁶ *Read v. Carpenter*, 1995 WL 945544, Del. Super., at *1.

⁷ *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del.1970).

⁸ *Rinaldi v. Iomega Corp.*, 1999 WL 1442014, at *2 (Del. Super. 1999).

⁹ *Id.*

¹⁰ *In re Santa Fe Pacific Corp. S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995).

Defamation

For purposes of this part of this discussion, defendants Musumeci, Atkins and CLASI will be considered together but apart from defendants Hennessey and Goldenberg who will be considered individually.

Defendants Atkins, Musumeci and CLASI

Assuming *arguendo* that each of these defendants made statements that were defamatory, the Court must, in the first instance, decide whether the plaintiff has instituted a viable claim against them in this regard. The answer is no.

First, these defendants are correct in their assertion that statements made during the HRC hearing and in the related pleadings are protected.¹¹ The plaintiff's contention that certain communications between some or all of the defendants preceded the filing of the HRC complaint and, therefore, are not protected, is without merit. In Delaware, the privilege is not confined to events occurring inside a

¹¹ See *Barker v Huang*, 610 A.2d 1341, 1345 (Del. 1992) and *Tatro V v. Esham*, 335 A.2d 623, 626 (Del. Super. 1975).

courtroom, but extends to all communications *relating* to the litigation, including communications with witnesses and the drafting and filing of pleadings.¹²

Second, the record indicates that defendants Atkins, Musumeci, and CLASI did not participate in whatever communications that took place prior to the institution of the HRC proceedings. Indeed, the plaintiff has failed, in either the initial complaint, the amendment thereto or in any supplemental filings in this matter, to establish whether these defendants said anything relative to the plaintiff. Again, the only connection between any alleged defamation and these defendants occurred in the context of the HRC proceedings, not before or after. The motion as to this cause of action as to these defendants must therefore be **granted**.

Defendant Hennessey

A similar conclusion is warranted insofar as defendant Hennessey is concerned for much the same

¹² *Sinex v. Bishop*, 2005 WL 3007805 Del. Super., at *4.

reasons, albeit with slightly different reasoning. Statements defendant Hennessey allegedly made leading up to or during the HRC proceedings are protected by the litigation privilege. Although the statements may have been inaccurate, they were clearly made in her role as an advocate for the hearing impaired. She was not otherwise involved in the underlying controversy in that she had no contact with the plaintiff, the Hempels or defendant Hennessey until after the appointment in question had been made and cancelled.

In addition, it is the role of the Court, in the first instance, to determine whether “. . . a communication is capable of bearing a particular meaning, and whether that meaning is defamatory.”¹³ After reviewing the statements attributed to defendant Hennessey following the aborted appointment with the plaintiff, the Court must conclude that whatever was attributed to this defendant cannot be considered defamatory in this context. Again, it was in her role as an advocate that she sought to assist the Hempels in

¹³ *Read v. Carpenter*, 1995 WL 945544 (Del. Super) at *2.

pursuing what appeared to be, based upon what she was purportedly told by Defendant Goldenberg, their grievance against the plaintiff.

Defendant Goldenberg

The conclusions as to the protection afforded by the litigation privilege apply with equal force to this defendant with one distinction. The privilege shield would not immunize any alleged defamation before and unrelated to any efforts to **address** the alleged grievance between the Hempels and the plaintiff. While such statements might form the basis of the controversy, they do not assist the prosecution in the litigation or aid those participating therein, and as such are not subject to the protection of the privilege.

Tortious Interference with Business Relationships or

Expectancies

The basic elements which establish a prima facie tortious interference with a business relationship in Delaware are the existence of a valid business relation (not necessarily evidenced by an enforceable contract) or expectancy; knowledge of the relationship or expectancy on the part of the interferer; an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and resultant damage to the party whose relationship or expectancy has been disrupted.¹⁴ One is liable for commission of this tort who interferes with business relations of another, both existing and prospective, by inducing a third person not to enter into or continue a business relation with another or by preventing a third person from continuing a business relation with another.¹⁵

Unfortunately for the plaintiff, this claim is also

¹⁴ *Bowl-Mor Co. v. Brunswick Corp.*, 297 A.2d 61, 65 (Del. Ch. 1972).

¹⁵ *Id.*

barred by the absolute privilege to the same extent that it applied to the moving defendants in connection with the plaintiff's claim for defamation. This is so where the substantive basis for the interference claim is the functional equivalent of defamation.¹⁶ However denominated, the plaintiff's claim is that the Defendants intentionally made derogatory false statements regarding her interaction with the Hampels either in pleadings filed with the HRC or in communications relating to proceedings before the HRC. To the extent that such statements were made in the course of those proceedings, they are privileged, regardless of the tort theory by which the plaintiff seeks to impose liability. Therefore, the Court finds that the absolute privilege applies to bar all claims against the Defendants except as noted above.¹⁷

Civil Conspiracy

It appears that the plaintiff is alleging that the

¹⁶ *Sinex*, 2005 WL 3007805 Del. Super., at *5.

¹⁷ *Id.*

defendants engaged in a civil, as opposed to a criminal, conspiracy to interrupt and/or interfere in the legal relationship that was about to be commenced between the plaintiff and the Hempels regarding a potential personal injury claim. The instant conspiracy is based upon the alleged fraudulent concealment of "information and the truth, which have obviated the need for the [HRC] hearing and the resulting damages to [the plaintiff]. . . ." ¹⁸ According to the plaintiff in her amended complaint, all that could have been avoided had the defendants not engaged in the aforementioned conspiracy and simply told the truth.

To establish that such a conspiracy existed and that harm to the plaintiff resulted, it is not necessary that there be an express agreement. ¹⁹ What is necessary is evidence of a combination between two or more persons, followed by an unlawful act carried out in furtherance of

¹⁸ See Am. Compl. at ¶ 66.

¹⁹ *Empire Fin. Servs. v. Bank of N.Y.*, 900 A.2d 92, 97 (Del. 2006).

such combination, and damages.²⁰ The Restatement takes a similar approach explaining that the conspirators' "agreement need not be expressed in words and may be implied and understood to exist from the conduct itself."²¹

To establish a claim for fraud, the plaintiff must plead his or her cause of action with particularity.²² This includes the "time, place and contents of the false representations."²³ These requirements extend to a cause of action alleging a conspiracy to commit fraud.²⁴ Any complaint which fails to so put the defendant on notice is subject to dismissal.

²⁰ *Id.*

²¹ Restatement (Second) of Torts 876(a). See also e.g., *Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049, 1057 (Col. 1995) (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 46, at 323-24 (5th ed. 1984) for the proposition that an "express agreement is not necessary, and all that is required is that there be a tacit understanding"

²² See Del. Super. Ct. Civ. R. 9(b); *Albert v. Alex Brown Mgmt. Services, Inc.*, 2005 WL 2130607 (Del. Ch. August 25, 2005).

²³ *Browne v. Robb*, 583 A.2d 949 (Del. 1990).

²⁴ *Albert*, 2005 WL 2130607 at *11.

Defendants Atkins, Musumeci & CLASI

This count fails as well to state a claim upon which relief could be granted and therefore must be dismissed as to each of the defendants with the exception of defendant Goldenberg, for two reasons. First, the Court has already ruled that any statements made by these defendants are protected by the litigation privilege. As such, they can not constitute an illegal or wrongful act and thereby form the basis of a conspiracy. And the conspiracy can not exist without the same.²⁵ Second, notwithstanding the valiant efforts by the plaintiff in this regard, the pleadings are silent as to the particulars of the fraud committed by these defendants, again, with the exception of defendant Goldenberg. And, to state that it will be supplied later is not sufficient.²⁶ Accordingly, dismissal is the only viable result.

This count survives only as to defendant Goldenberg

²⁵ *Ramunno v. Cawley*, 705 A.2d 1029, 1039 (Del. 1998); *Dutton v. Watson*, 1994 WL 164486 Del. Super. at *3.

²⁶ *Nebenzahl v. Miller*, 1996 WL 494913 Del. Ch. at *2.

and only to the extent of the misrepresentations
referenced in Paragraph 20 of the Amended Complaint
read in the context of Paragraphs 65 thru 67 of Count
III. As noted above, those statements are not
protected by the litigation privilege.

CONCLUSION

_____For the forgoing reasons, the motions to dismiss filed on behalf of defendants Atkins, Musumeci, CLASI and Hennessey are **granted**. The motion to dismiss as to defendant Goldenberg is **denied** as to any statements made before and unrelated to the proceedings before the Human Relations Commission as described above. It is otherwise **granted**.

Toliver, Judge